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### Europeanisation of civil procedure: towards common minimum standards?

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# Europeanisation of civil procedure

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Towards common minimum  
standards?

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IN-DEPTH ANALYSIS

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EPRS | European Parliamentary Research Service

Author: Rafał Mańko

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This in-depth analysis aims to provide a broad overview of the policy field of the 'Europeanisation' of civil procedure. It addresses the competence of the EU in this field, the existing instruments and the prospects of elaborating EU-wide principles of civil procedure which could be the basis of a directive prescribing minimum standards of fundamental rights protection in civil litigation.

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## EXECUTIVE SUMMARY

The free movement of judgments in the European Area of Justice presupposes a high level of mutual trust between the judiciaries of the Member States. From the citizen's perspective, the key issue is the balancing of the fundamental rights of claimants and defendants, i.e. the right of access to justice (to pursue a claim) and the rights of the defence. Mutual trust in judiciaries can be built in various ways. Firstly, through the creation of uniform European procedures in the form of optional instruments, leading to the pronouncement of judgments on the basis of common rules of procedure. Secondly, a sectoral harmonisation of procedural law is possible, addressing selected issues in line with a piecemeal approach. Thirdly, a set of common minimum standards, in the form of principles and rules, could be developed and later enacted in the form of a directive.

EU competence in the field of civil procedure was definitively confirmed by the Treaty of Amsterdam and expanded by the Treaty of Lisbon. Although limited to cross-border cases, it does not require that EU civil justice measures necessarily serve the proper functioning of the internal market. At the same time, the internal market competence can also be used, by itself or jointly, as a basis for harmonising civil procedure.

The existing legislative *acquis* on civil procedure can be divided into three groups. The first is optional unification by way of regulations ('optional instruments'), which create EU optional procedures and documents. There are currently three optional EU civil procedures: the European Small Claims Procedure, the European Order for Payment Procedure, and the European Account Preservation Order Procedure, coupled with the Online Dispute Resolution out-of-court procedure. Furthermore, two optional EU titles are available, the European Enforcement Order and the European Certificate of Succession.

A second branch of EU legislation on civil procedure is that with sector-specific directives, which harmonise certain aspects of civil procedure in the context of EU policies other than judicial cooperation in civil matters. The *acquis* within this branch comprises four directives: the Consumer Injunctions Directive, the Consumer Alternative Dispute Resolution (ADR) Directive, the Intellectual Property Rights (IPR) Enforcement Directive and the recently enacted Antitrust Damages Directive.

Thirdly, there are three EU instruments which provide for piecemeal, yet horizontal harmonisation, establishing minimum standards of civil procedure across the EU. Two of these instruments establish binding standards in the form of directives (the Legal Aid Directive and the Mediation Directive) and one, enacted in the particularly controversial area of class actions, has a non-binding nature (the Collective Redress Recommendation).

Finally, the paper analyses the prospects for a horizontal measure addressing minimum standards of EU civil procedure and developments in that direction in the guise of the recently launched joint project of the European Law Institute and the International Institute for the Unification of Private Law (Unidroit). This project aims at elaborating a European variant of the Unidroit 'Transnational Principles of Civil Procedure' and could be a source of inspiration for a possible future directive on minimum standards in civil procedure in the Member States.

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# 1. Free movement of judgments, balancing fundamental rights and the need for mutual trust

## 1.1. Introduction

In legal terms, the free movement of citizens, goods, services and capital, leads to the creation of cross-border legal relationships, involving more than one legal system. The rules of private international law, such as the Rome I Regulation,<sup>1</sup> prescribe which system of substantive private law is to govern such relationships. Rules of international civil procedure (sometimes also treated as part of private international law) prescribe which court has jurisdiction, as well as establish the conditions for the recognition and enforcement of judgments originating from other Member States. Within EU law, the most important instrument of international civil procedure is the Brussels Ia Regulation,<sup>2</sup> a successor to the former Brussels Convention, coupled with a number of sectoral regulations (Brussels IIa, Succession Regulation, Insolvency Regulation). This legal framework provides for the **free movement of judgments** within the European Area of Justice.

Substantive private law provides for the **rights and duties** of legal subjects (citizens, companies), whilst procedural private law (civil procedure) provides for these rights to be **enforced or modified in legal proceedings** (before courts or arbitration).<sup>3</sup> Civil procedure is therefore 'a key element of any private law system'.<sup>4</sup>

The principle of the free movement of judgments has recently been strengthened, first by 'second generation' instruments (the European Small Claims Procedure and the European Order for Payment Procedure), and later by the Brussels Ia Regulation. Unlike Brussels I, they no longer provide for so-called *exequatur*, that is a procedure whereby a foreign judgment needs to be formally recognised. Instead, a system of so-called 'reverse *exequatur*' obtains, whereby the defendant-debtor, upon learning of the foreign judgment, may commence proceedings aimed at rendering it ineffective in the state of enforcement on a limited number of grounds.

The free movement of judgments presupposes a great degree of mutual trust in the judiciaries of other Member States, and in particular in the level of protection of procedural rights. 'Mutual trust' in this context is understood as 'the confidence that Member States should have in each other's legal system and courts, which results in the prohibition to review what other States and their judiciaries are doing'.<sup>5</sup>

One aspect of looking at the issue of mutual trust is by enquiring whether **fundamental rights**, such as the right of access to justice and rights of the defence, have been observed, and – as regards the conflicting rights of the claimant and defendant –

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<sup>1</sup> [Regulation \(EC\) No 593/2008](#) of 17 June 2008 on the law applicable to contractual obligations (Rome I).

<sup>2</sup> [Regulation \(EU\) No 1215/2012](#) of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>3</sup> C.H. van Rhee, '[Civil Procedure: A European \*Ius Commune?\*](#)', *ERPL* 4 (2000): 589-611, p. 591; M. Tulibacka, M. 'Europeanization of Civil Procedures: In Search of a Coherent Approach', *CMLR* 46.5 (2009): 1527–1565, p. 1532.

<sup>4</sup> A. Schwartz, 'Enforcement of Private Law: The Missing Link in the Process of European Integration', *ERPL* 1 (2000): 135-146, p. 136.

<sup>5</sup> X.E. Kramer, '[Cross-border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure](#)', *International Journal of Procedural Law* 2 (2011): 202-230, p. 218.

equitably balanced. However, as will be illustrated in the following section, reliance on open-ended norms in the European Convention on Human Rights (ECHR) and EU Charter of Fundamental Rights, as interpreted on a case-by-case basis by the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU), may prove to be insufficient to guarantee a necessary level of legal certainty to EU citizens and companies. Furthermore, the balance between pro-claimant/creditor and pro-defendant/debtor approaches may differ from Member State to Member State, depending on the deeper political and axiological choices underlying civil procedure. Indeed, the law of civil procedure is not a stand-alone legal field, but rather 'is embedded in a web of legal, political, economic and social expectations, some of which the procedural system helps to create.'<sup>6</sup>

In order to increase mutual trust – a precondition of mutual recognition<sup>7</sup> – three options can be pursued which are not mutually exclusive. First of all, certain types of procedures can be unified at EU level, and the outcomes of such procedures (judgments) will benefit from mutual trust since they are based on a uniform set of procedural principles. This approach is implemented in the form of so-called 'optional instruments', which strike an EU-wide balance on the rights of claimants and defendants. These optional instruments – discussed in more detail in section 3 below – rely, however, to a large extent upon background rules of national procedural law, for instance with regard to the composition of the court or detailed rules on evidence.

A second option is to bring about common standards by way of directives. Until now, this has been done in two ways – firstly, by way of sector-specific directives, addressing, inter alia, civil procedure in the context of enforcement of claims arising under a given sector of EU law, such as consumer law, intellectual property (IP) law, or competition law (as presented in section 4). Secondly, by way of piecemeal horizontal directives, which address a given aspect of civil procedure in a non-sector-specific way ('horizontally'), but nevertheless are limited to specific aspects of civil procedure ('piecemeal'), such as legal aid or mediation. This approach is presented in section 5.

A third option is to adopt an across-the-board horizontal approach, which would not only be non-sector-specific, but also address the fundamental principles of a fair civil procedure in an encompassing way. The road seems to lead through the adoption of soft-law instruments, drawing on the experience of the American Law Institute and Unidroit principles of transnational civil procedure. In fact, the first efforts in this direction were already undertaken in May 2014 by the European Law Institute, in collaboration with Unidroit. The European Parliament is an observer in these proceedings. This approach, and its possible end-product in the form of a horizontal directive on minimum standards of civil procedure, is addressed in section 6.

However, as the Union is based on the principle of conferral of powers upon it by the Member States, the EU legislature can act only if there is a legal basis in the Treaties, and only within the limits of that legal basis. Therefore, as a preliminary issue, the question of legal basis will be addressed in section 2.

<sup>6</sup> S. Sherry, J. Tidmarsh, *Civil Procedure: Essentials* (Aspen, 2007), p. 48.

<sup>7</sup> Tulibacka, 'Europeanization of civil procedures...', p. 1542.

## 1.2. Civil procedure and balancing fundamental rights

### 1.2.1. Relevance of fundamental rights in civil proceedings

The right to a fair trial, as enshrined in Article 6 of the ECHR and in Article 47 of the EU Charter of Fundamental Rights, 'represents one of the most fundamental guarantees for the respect of democracy and the rule of law'.<sup>8</sup> It applies equally to criminal and civil proceedings. The 2009 entry into force of the Charter of Fundamental Rights as a legally binding instrument, had direct impact upon the area of civil procedure. The standard set out in Article 47 is triggered whenever **rights and freedoms guaranteed under EU law** are at stake. Therefore, Member States must follow Article 47 in all civil proceedings which involve subjective rights granted under EU law or in the implementation of EU law<sup>9</sup> (e.g. rights granted under consumer directives).

Whenever the **free movement of civil judgments** is at stake, the observance of Article 47 of the Charter before the court in the Member State of origin is always at stake, regardless of whether the object of litigation falls within the scope of EU law or not. This is because once the judgment begins its 'free movement' to another Member State, a possibility to block its enforcement (on the basis of 'public policy' doctrine) will lead to the (potential) examination of the fairness of proceedings in the Member State of origin in the light of the fundamental right to an effective remedy and fair trial.

### 1.2.2. Fundamental rights in civil procedure under the EU Charter

The fundamental right in question, as framed in Article 47 of the Charter, includes the following elements:

- the right to an **independent, impartial court** (tribunal) previously established by law;
- the right to an **effective** remedy;
- the right to a **fair trial**;
- the right to a **fair and public hearing**;
- the right to a hearing organised **within reasonable time**, i.e. without undue delay;
- the right to be **advised, defended and represented**;
- the right of persons lacking sufficient resources to **legal aid**, if necessary.

Since all seven of the above aspects of civil proceedings are framed as fundamental rights, any departure therefrom is subject to the conditions in respect of limiting the exercise of rights and freedoms laid down in Article 52 of the Charter. In particular the 'essence' of those rights may not be affected. Limitations must be provided for by law, and they must be proportional, meaning that they may be made only if necessary and genuinely required by objectives of general interest recognised by the EU, or by balancing with rights of others.

### 1.2.3. Balancing fundamental rights in civil proceedings

The recognition of a judgment from a different Member State implies 'acceptance that the court of origin has validly determined the rights and obligations of the parties',<sup>10</sup> that is, that the right to a fair trial is respected. Indeed, 'the regime for the recognition and enforcement of foreign judgments aims to strike a balance between the protection

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<sup>8</sup> C. Rozakis, '[The Right to a Fair Trial in Civil Cases](#)', *Judicial Studies Institute Journal* 4.2 (2004): 96-106, p. 96.

<sup>9</sup> See [Case C-399/11 Melloni](#). Cf. F. Ferraro, J. Carmona, [Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty](#), PE 554.168 (EPRS, 2015), p. 12.

<sup>10</sup> J.J. Kuipers, '[The Right to a Fair Trial and the Free Movement of Civil Judgments](#)', *Croatian Yearbook of European Law and Policy* 6 (2010): 23-51, p. 23.

of the rights of defence and facilitation of the free movement of judgments within the common European justice area.<sup>11</sup>

The right to a fair trial covers not only respect of the rights of parties in the original proceedings, but also the speedy enforcement of the judgment in the state of enforcement.<sup>12</sup> The CEUJ has pointed out that the Brussels I Regulation 'express[es] the intention to ensure that ... proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence are observed'.<sup>13</sup>

The defendant's rights of defence must be balanced with the claimant's right to pursue their claim before a court of law,<sup>14</sup> i.e. the right of access to justice. This balancing may lead to the limitation of the rights of the defence.<sup>15</sup> In particular, the objective of preventing denial of justice (for the claimant) justifies limitations to the right of defence.<sup>16</sup> However, if it is found that the limitation of the rights of the defence goes too far and is disproportionate, the court of enforcement may refuse to enforce such a judgment on the basis of the public policy exception. For instance, in *Gambazzi*,<sup>17</sup> the defendant was completely excluded from the proceedings for not complying with an earlier order, and in *Seramico Investments*,<sup>18</sup> a default judgment did not contain any reasoning or legal basis, thus preventing the defendant from being able to launch an 'appropriate and effective' appeal. In both cases, however, the CJEU left the final word as to the violation of the fundamental right to the national court.

On the other hand, if the defendant's place of domicile is unknown, the CJEU, following the ECtHR, has held that summons by public notice (placed on the court building where the case has been filed) does not constitute an excessive restriction of the right to a fair trial, provided that the court seised in the matter has first satisfied itself that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant.<sup>19</sup> However, such a default judgment – issued against a defendant whose address is unknown – may not benefit from the European Enforcement Order since that would not give sufficient guarantee of observance of the rights of the defence.<sup>20</sup>

These examples from case law indicate that balancing the fundamental rights of the claimant and defendant is not trivial and automatic, but rather controversial and contested, leading to litigation and questions being posed to the courts in Strasbourg and Luxembourg. This, in turn, indicates a lack of legal certainty in this field.

<sup>11</sup> Kuipers, 'The Right to a Fair Trial...', p. 26.

<sup>12</sup> See e.g. the case of *K v Italy* in which the ECtHR found that Italy failed to fulfil its obligations under Article 6 ECHR for failing to render a decision of a foreign maintenance judgment in due time (App no. 38805/97, ECHR 2004-VIII). Cf. Kuipers, "The Right to a Fair Trial...", p. 26.

<sup>13</sup> [Case 125/79 Denilauler](#), para. 13; [Case C-394/07 Gambazzi](#); para. 23; [Case C-292/10 G v De Visser](#), para. 47.

<sup>14</sup> [Case C-292/10 G v De Visser](#), para. 48.

<sup>15</sup> [Case C-394/07 Gambazzi](#); para. 29; [Case C-292/10 G v De Visser](#), para. 49.

<sup>16</sup> [Case C-327/10 Hypoteční banka](#), para. 51; [Case C-292/10 G v De Visser](#), para. 50.

<sup>17</sup> [Case C-394/07](#).

<sup>18</sup> [Case C-619/10](#).

<sup>19</sup> [Case C-292/10 G v De Visser](#), para. 59.

<sup>20</sup> *Ibid.*, paras. 61-68.

#### 1.2.4. *The need for legal certainty*

The fact that Article 47 of the Charter is now binding, and pending the EU's accession to the ECHR, Article 6, in the guise of general principles, is part of the Union's legal order, does not necessarily mean that the level of protection of the right to a fair trial, and in particular the delicate balance between the claimant's right of access to justice and the defendant's rights of the defence, is harmonised across the EU.

Although the principles expressed in these two Articles are undoubtedly part of the legal order of the Union and of its Member States, they are phrased in an open-ended manner, rather than as detailed rules. Their interpretation on a case-by-case basis both by the CJEU (in the preliminary reference procedure) and the ECtHR (upon application by individuals against a Member State as a party to the Convention) brings some clarity. Nevertheless, from the point of view of the **principle of legal certainty**, which 'requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law',<sup>21</sup> the judicial development of the minimum standards on a case-by-case basis does not automatically guarantee that citizens and companies can rely on clear, precise and predictable rules with regard to the minimum EU standards of civil procedure.<sup>22</sup>

### 1.3. Increased need for 'mutual trust' after the abolition of *exequatur*

The importance of 'mutual trust', that is the reciprocal confidence of EU Member States' in each other's legal and judicial systems,<sup>23</sup> has grown immensely following the abolition of *exequatur*. This procedure, being the formal acceptance of a foreign judgment by the judiciary of the Member State of enforcement, was first abolished in the 'second generation' instruments, namely the European Enforcement Order, the European Order for Payment and the European Small Claims Procedure. In the 'recast' Brussels Ia Regulation, the abolition of *exequatur* was extended to most civil and commercial judgments.

However, whilst the Commission's original proposal aimed at doing away with *exequatur* completely, the final text of Brussels Ia preserves what is sometimes referred to as 'reverse *exequatur*'.<sup>24</sup> The difference between a traditional *exequatur* and 'reverse *exequatur*' is that under the former system, the judgment must be verified by the Member State of execution before it becomes enforceable, whilst in the latter system, this procedure of limited review must be initiated by the debtor at the stage of enforcement proceedings.

Although the substance of the earlier *exequatur* procedure and the new 'reverse *exequatur*' procedure is almost identical,<sup>25</sup> the reform introduced by Brussels Ia

<sup>21</sup> [Case C-48/14 Parliament v Council \(Radioactive Water Directive\)](#), para. 45; cf. [Case C-51/13 Nationale-Nederlanden](#), para. 29.

<sup>22</sup> Kramer, 'Cross-Border Enforcement...', p. 223-224.

<sup>23</sup> *Ibid.*, p. 218.

<sup>24</sup> P. Grzegorzcyk, 'Nowy fundament europejskiego prawa procesowego cywilnego: jurysdykcja krajowa, zawisłość sprawy oraz uznawanie i wykonywanie orzeczeń w sprawach cywilnych i handlowych według rozporządzenia Rady i Parlamentu Europejskiego nr 1215/2012 (Bruksela Ia) (część II)' [A New Foundation of European Law of Civil Procedure: National Jurisdiction, Lis Pendens, Recognition and Enforcement of Judgments in Civil and Commercial Matters According to Brussels Ia], *Przeгляд Sądowy* 23.7-8 (2014): 7-43, p. 35.

<sup>25</sup> P.A. Nielsen, 'The New Brussels I Regulation', *Common Market Law Review* 50 (2013): 503-528, p. 527; P. Staszczuk, 'Automatyczna wykonalność orzeczeń sądów zagranicznych na podstawie rozporządzenia Parlamentu Europejskiego i Rady (UE) nr 1215/2012 "Bruksela I bis"' [Automatic Enforceability of Foreign Judgments According to Brussels Ia], *Przeгляд Sądowy* 23.9 (2014): 80-88, p. 83.

certainly changes the **balance of interests between debtors and creditors** in favour of the latter.<sup>26</sup> Under Brussels I, a creditor wishing to enforce a judgment in other Member States had to go through the *exequatur* procedure in each and every country. Under Brussels Ia, the judgment is enforceable across the EU, and it is up to debtors in each Member State to attempt to block its enforcement by triggering the 'reverse *exequatur*' procedure. If the debtors do not undertake any action within the prescribed deadline, the judgment becomes fully enforceable. The Regulation differentiates between refusal of recognition and refusal of enforcement. The latter is permissible if the grounds for the former are present. The principle of 'reverse *exequatur*' is also applicable to matters of matrimony and parental responsibility.

It is widely assumed that 'mutual recognition requires first and foremost mutual trust',<sup>27</sup> and the abolition of *exequatur* presumes an increased level of such trust, as it lowers the threshold of acceptance of judgments from fellow Member States. The importance of such forms of raising mutual trust cannot be underestimated, especially after the CJEU decision in *Aguirre Zarraga v Pelz*,<sup>28</sup> where in the context of the enforcement of a certified judgment ordering the cross-border return of a child, the Court ruled out the possibility for the Member State of enforcement to analyse whether the Charter of Fundamental Rights was violated in the main proceedings.

Whilst mutual trust may be fostered *inter alia* by non-legislative methods, such as judges cooperating within the European Judicial Network or participating in training, this paper focuses on 'Europeanisation', understood as legislative action. Therefore, a preliminary issue addressed in the following section is the Union's legislative competence to regulate civil procedure, i.e. to 'Europeanise' it.

#### 1.4. Civil procedure and national legal culture

In efforts towards the harmonisation and/or unification of civil procedure in the EU, an appropriate balance needs to be found between the requirements of the internal market and increasing mutual trust on the one hand, and the need to respect Member States' national identities on the other. It has been pointed out that civil procedure is not merely a question of technical rules, but actually:

*reflects a nation's political organisation, social and economic structure, its constitutional and social identity, as well as the arrangements for wealth distribution. It is a complex area of policy-driven rules the application of which is irrevocably linked to legal cultures and judicial practices. It is difficult to ignore discrepancies in litigation practices across Europe. The role of judges and parties in litigation, and the methods of funding and costs of litigation vary significantly.*<sup>29</sup>

Regardless of the existence of a legally plausible legal basis for going forward with the Europeanisation of civil procedure (see Section 2 below), any instrument addressing this issue horizontally (Section 6) must strike an appropriate balance between the need for harmonisation and national variations, not least through the choice of the level of detail of regulation (between abstract and open-ended standards on the one hand, and detailed rules, on the other).

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<sup>26</sup> P. Staszczuk, 'Automatyczna...', p. 86.

<sup>27</sup> Kramer, 'Cross-Border Enforcement...', p. 217.

<sup>28</sup> [Case C-491/10 PPU](#).

<sup>29</sup> Tulibacka, 'Europeanization of civil procedures...', p. 1532-1533. For a historical overview, see e.g. C.H. van Rhee (ed.), *European Traditions in Civil Procedure* (Intersentia, 2005).

## 2. The legal basis for 'Europeanisation' of civil procedure

### 2.1. Principles of conferral, subsidiarity and proportionality

Whilst national legislatures may, in principle, regulate any aspect of civil procedure, the EU may legislate in a given area only if it has explicit competence to do so (principle of conferral enshrined in Articles 4(1) and 5(1) Treaty on European Union (TEU)). Furthermore, the EU's legislative instruments must conform to the principles of subsidiarity and proportionality, meaning that even if the EU has the competence to enact legislation in a given area, it should not do so if the issue could be regulated better at Member State level (principle of subsidiarity enshrined in Article 5(3) TEU)<sup>30</sup> and that the extent of legislative measures must not exceed the aims provided for in the Treaties (principle of proportionality enshrined in Article 5(4) TEU).

### 2.2. Evolution of the legal basis

Civil procedure as an area of EU activity was already present in the Treaty of Rome, where Article 220 provided the first legal basis for a public international law form of Europeanisation of civil procedure.<sup>31</sup> Under this provision Member States undertook to enter into negotiations to simplify the formalities governing the reciprocal recognition and enforcement of judgments and arbitration awards.

However, Article 220 of the Treaty establishing the European Economic Community (TEEC), did not grant any specific competence to the Community as such, but was rather concerned with intergovernmental cooperation between the Member States.<sup>32</sup> The Europeanisation of civil procedure was therefore initially possible through a form of inter-governmental cooperation. On this basis, the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (signed on 27 September 1968) was enacted, and entered into force in 1973. This Article finally disappeared from the Treaties only with the Treaty of Lisbon.

The Union's actual competence to regulate civil procedure first appeared under the **Maastricht Treaty**, where it was placed within the intergovernmental 'Third Pillar'. The Amsterdam Treaty moved the competence towards the communitarian 'First Pillar',<sup>33</sup>

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<sup>30</sup> The principle of subsidiarity does not apply to areas which have been designated as exclusive EU competence (Article 2(1) TFEU). No aspect of civil procedure is included in the list of exclusive EU competences (Article 3(1) TFEU).

<sup>31</sup> A. Căluș, 'Umocowanie do zbliżania prawa prywatnego państw członkowskich w prawie Unii Europejskiej' [Competence to Harmonise the Private Law of the Member States] in M. Pazdan et al. (eds), *Europeizacja prawa prywatnego* [Europeanisation of Private Law] (Wolters Kluwer, 2008), p. 136.

<sup>32</sup> B. Ziemblicki, '[Zbliżanie ustawodawstw państw członkowskich Unii Europejskiej w zakresie prawa prywatnego](#)' [Approximation of Private Laws of the EU Member States], *Folia Iuridica Wratislaviensis* 1.1 (2012), p. 76.

<sup>33</sup> K. Weitz, 'Europejskie prawo procesowe cywilne – stan obecny i perspektywy dalszego rozwoju' [European Law of Civil Procedure: Current State of Affairs and Perspectives for Future Development], *Przegląd Sądowy* 17.2 (2007): 5-29, p. 9; K. Lubińska, 'Traktat Lizboński a współpraca sądowa w sprawach cywilnych' [The Lisbon Treaty and Judicial Cooperation in Civil Matters], *Państwo i Prawo* 10 (2008): 106-116, p. 108; J. Dąbała, '[Traktatowe podstawy prawne współpracy sądowej w sprawach cywilnych w Unii Europejskiej](#)' [The Treaty Legal Basis for Judicial Cooperation in Civil Matters in the European Union], *Roczniki Nauk Prawnych* 22.3 (2012): 21-33, p. 22.

thereby strengthening it and enabling EU civil justice measures to be issued in the legal form of regulations and directives.<sup>34</sup>

The **Amsterdam Treaty** explicitly introduced the objective of creating an 'area of freedom, security and justice' within the EU,<sup>35</sup> in order to facilitate the free movement of persons across the Union.<sup>36</sup> The Treaty of Amsterdam created the definitive legal basis for the Europeanisation of civil procedure, i.e. for the creation of a European procedural private law.<sup>37</sup> Therefore, unlike in the field of substantive private law, where the EU does not enjoy an explicitly formulated, general competence,<sup>38</sup> in the field of cross-border civil procedure its regulatory powers have been acknowledged unambiguously.

The Amsterdam Treaty was followed by a number of policy documents addressing civil justice, including in particular the Vienna Action Plan (1998),<sup>39</sup> the Tampere Conclusions (1999),<sup>40</sup> the Hague Programme (2004)<sup>41</sup> and the Stockholm programme (2010).<sup>42</sup> The current system of EU legislation in the field of civil procedure is a direct implementation of the aforementioned conclusions and programmes.<sup>43</sup>

The process of strengthening and emancipation of EU competence in the field of civil justice moved to a yet higher level with the entry into force of the **Lisbon Treaty**, which clearly identified civil justice as a distinct field of EU competence. A separate chapter on 'Judicial cooperation in civil matters' within Title V on an 'Area of Freedom, Security and Justice' was established in the Treaty on the Functioning of the European Union (TFEU). The adoption of EU civil justice measures no longer depends either on their necessity

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<sup>34</sup> K. Weitz, 'Europejskie prawo procesowe...', p. 10.

<sup>35</sup> See Article 65 TEC (now Article 81 TFEU).

<sup>36</sup> K. Kańska, 'Ochrona konsumentów w Unii Europejskiej a harmonizacja prawa postępowania cywilnego państw członkowskich' [Consumer protection in the EU and harmonisation of Member States' civil procedural law] in E. Piontek (ed.), *Reformowanie Unii Europejskiej* [Reforming the EU] (Zakamycze, 2005), p. 155.

<sup>37</sup> K. Weitz, 'Jurysdykcja krajowa oraz uznawanie i wykonywanie orzeczeń w sprawach cywilnych i handlowych w świetle prawa wspólnotowego' [National jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in the light of Community law], *Kwartalnik Prawa Prywatnego* 1/2004, p. 216; B. Ziemblicki, 'Zbliżanie...', p. 75; X.E. Kramer, [Current gaps and future perspectives in European private international law: towards a code on private international law?](#), PE 462.476 (EP, 2012), p. 6.

<sup>38</sup> H.-W. Micklitz, 'The EU as a Federal Order of Competences and the Private Law' in L. Azoulai (ed.), *The Question of Competence in the European Union* (OUP, 2014), p. 132-133; R. Mańko, [EU competence in private law: The Treaty framework for a European private law and challenges for coherence](#), PE 545.711 (EPRS, 2015), p. 4.

<sup>39</sup> Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, OJ C 19 of 23.1.1999, p. 1.

<sup>40</sup> Tampere European Council 15 and 16 October 1999: [Presidency Conclusions](#).

<sup>41</sup> The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53 of 03.03.2005, p. 1.

<sup>42</sup> The Stockholm Programme: An open and secure Europe serving and protecting citizens, OJ C 115 of 04.05.2010, p. 1-38.

<sup>43</sup> Dąbala, 'Historyczny rys rozwoju współpracy sądowej w sprawach cywilnych w Unii Europejskiej' [A Historical Overview of the Development of Judicial Cooperation in Civil Matters in the EU] in *Księga pamiątkowa dedykowana prof. Romanowi Tokarczykowi*, [vol. 5 Prawo](#) [Law] (Polihymnia, 2013), p. 35.

for the 'proper functioning' of the internal market,<sup>44</sup> nor on the link with the free movement of persons, making it an independent competence.<sup>45</sup> This new approach to EU competence in the field of civil procedure should be viewed in the broader context of moving European integration beyond the market focus towards encompassing EU citizenship.<sup>46</sup>

However, despite this paradigm shift, the requirement of a **cross-border element** has been maintained under Lisbon, which means that EU involvement in civil justice is possible only if there are connecting factors in a case (e.g. residence, place of performance etc.) pointing to at least two different Member States.<sup>47</sup>

The peculiarity of EU legislation in the field of civil procedure is that part of it is enacted on the legal basis of judicial cooperation in civil matters, but some of it – the sector-specific instruments – is adopted on an internal-market legal basis. The following two sections will seek to provide some clarity as to the two competing legal bases used, and their relationship.

### 2.3. Judicial cooperation in civil matters – Article 81 TFEU

#### 2.3.1. *The legal basis*

Within the current Treaty framework, the legal basis for the harmonisation of private international law and cross-border civil procedure is found in Title V TFEU, devoted to the Area of Freedom, Security and Justice. Specifically, Article 67(4) TFEU gives the EU competence to **facilitate access to justice**, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

This rule is developed in Article 81 TFEU. It gives the EU power to promote judicial cooperation in civil matters **with cross-border implications**, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. The Treaty explicitly provides that, within the framework of this cooperation, the EU may adopt legal acts for the approximation of laws of the Member States. Such acts may be adopted 'particularly' when necessary for the proper functioning of the internal market, but such a link is not obligatory (as opposed to the internal market competence in Article 114 TFEU, where such a link must always exist).

The notion of 'cross-border *implications*' is broader than 'cross-border *litigation*',<sup>48</sup> and therefore purely domestic litigation, but with some kind of cross-border element, will be included in the scope of Article 81 TFEU.

#### 2.3.2. *Areas covered*

According to the Treaty, such acts may be adopted for: the mutual recognition and enforcement of judgments and extrajudicial decisions, as between the Member States; the cross-border service of judicial and extrajudicial documents; the compatibility of the private international law rules of the Member States (conflict of laws, and conflict

<sup>44</sup> The notion of the '*proper functioning*' (ex Article 65 TEC, now Article 81 TFEU) is broader than necessity for the (mere) "functioning" of that market in Articles 114-115 TFEU. See e.g. C. Stumpf in: J. Schwarze (ed.), *EU-Kommentar*, (3rd ed., Baden-Baden: Nomos, 2012), p. 1043.

<sup>45</sup> K. Weitz in A. Wróbel (ed.) *TWE Komentarz* (LEX, 2009), vol. 2, p. 225.

<sup>46</sup> L. Moccia, 'European Law: From "Market" to "Citizenship"' in idem (ed.), *The Making of European Private Law: Why, How, What, Who* (Sellier, 2013), p. 51.

<sup>47</sup> Stumpf, op. cit., p. 1042. Cfr. K. Weitz, 'Europejskie prawo procesowe...', p. 7; Dąbala, 'Traktatowe podstawy...', p. 30.

<sup>48</sup> Peers, *Justice and Home Affairs...*, p. 611-612.

of jurisdictions); cooperation in the taking of evidence; effective access to justice; the elimination of obstacles to the proper functioning of civil proceedings, which may include making national civil procedures more compatible; the development of alternative dispute resolution (ADR); and support for training of judges and other court staff. The list is only exemplary and other forms of promoting judicial cooperation in civil matters, not mentioned on the list, are also permissible.<sup>49</sup>

The scope of EU competence to regulate private international law is treated as unlimited by subject matter, meaning that any aspect of conflict of laws and conflict of jurisdictions may be regulated, regardless of the field of private law with which they are concerned (law of obligations, law of persons, property law, family law, succession law, etc.).<sup>50</sup> Therefore, from a competence perspective, a comprehensive European Code of Private International Law would be feasible in the long run.<sup>51</sup>

### 2.3.3. *Applicable legislative procedure*

In principle, the **ordinary legislative procedure** is to be followed. However, whenever aspects of cross-border family law are at stake, a **special legislative procedure** is applicable, requiring a unanimous decision of the Council, with the Parliament only being consulted. However, the Council may unanimously decide, upon a Commission proposal, to subject some areas of cross-border family law to the ordinary legislative procedure. National parliaments have a right of veto against that decision. Denmark does not take part in the adoption of laws on the basis of Article 81 TFEU, whereas the UK and Ireland decide on a case-by-case basis whether they wish to participate.<sup>52</sup> Within cross-border family law, the procedure of enhanced cooperation (Articles 326-334 TFEU) was used to enact the 'Rome III' Regulation on divorce and legal separation (1259/2010).

### 2.3.4. *Choice of instrument – regulations and directives*

The main legal basis for the Europeanisation of civil procedure, Article 81 TFEU, explicitly provides that the development of judicial cooperation in civil matters 'may include the adoption of **measures for the approximation** of the laws and regulations of the Member States.' In paragraph 2 it specifies that the ordinary legislative procedure applies, and refers to the legal acts indiscriminately as 'measures', using a generic term which covers both directives and regulations. Hence, there is no doubt that Article 81 may serve as a basis for **harmonisation of national laws by directives**.<sup>53</sup>

Under Article 296(1) TFEU in situations where the Treaties 'do not specify the **type of act** to be adopted' (as is the case in Article 81 TFEU), 'the institutions shall select it on a **case-by-case basis**, in compliance with the applicable procedures and with the principle of proportionality'. The principle of proportionality, enshrined in Article 5(4) TEU, provides that 'the content **and form** of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. This Treaty principle is commonly interpreted as meaning that it is preferable to resort to non-binding instruments rather than binding ones, and – among binding instruments – to resort to directives rather than

<sup>49</sup> Kańska, 'Ochrona konsumentów...', p. 156.

<sup>50</sup> Kramer, *Current gaps...*, p. 13.

<sup>51</sup> *Ibid.*, p. 18.

<sup>52</sup> See Protocol 22 (Denmark) and Protocol 21 (UK and Ireland) annexed to the Treaties.

<sup>53</sup> Cfr. K. Weitz in *TWE Komentarz*, vol. 2, p. 225.

regulations.<sup>54</sup> There is nothing objectionable, therefore, in enacting legislation in the form of directives in the field of European civil procedure.

## 2.4. The internal market legal basis and civil procedure

### 2.4.1. CJEU guidance on choosing the legal basis

Although Europeanisation of civil procedure is provided with a specific legal basis in Article 81 TFEU, a number of purely procedural legal acts, or legal acts with explicit procedural implications, have been adopted by the EU legislature on the basis of Article 114 TFEU (harmonisation in the internal market) (for an overview see Section 4). The rationale for this is to be found in CJEU case law on choosing the legal basis.

According to settled Court of Justice case law, the choice of the legal basis for an EU legal act must rest on objective factors amenable to judicial review, which include in particular the **aim and the content** of the measure.<sup>55</sup> If a legal act has **two purposes or two components**, and one of them is the main one, whereas the other is 'merely incidental', the CJEU requires that the legal act be based on a **single legal basis**, which must be in accordance with the main purpose or component of the legal act.<sup>56</sup> On the other hand, if the legal act in question pursues many objectives at the same time which are on the same level (there is no 'main' and 'secondary' objective), all the legal bases must be invoked.<sup>57</sup> However, the CJEU presumes that, as a rule, an EU legal act pursues one main objective and others are ancillary, and treats the situation of equivalent objectives as an exception which needs to be established.<sup>58</sup>

### 2.4.2. Relationship between Articles 114 and 81 TFEU

Therefore, in line with the requirements set out by the ECJ, if a given legal act mainly pursues the objective of harmonising civil procedure, it should be based exclusively on Article 81 TFEU, and if it is mainly concerned with harmonisation of rules governing the internal market, whilst the element of civil procedure is merely ancillary, the legal act ought to be based exclusively on Article 114 TFEU. Article 81 TFEU is concerned exclusively with civil procedure and private international law, and therefore may not be invoked as a legal basis for measures harmonising substantive private law.<sup>59</sup>

Until the entry into force of the Treaty of Lisbon, both Articles 81 TFEU and 114 TFEU contained a reference to the internal market. However, after the Treaty of Lisbon, which removed the internal market requirement from Article 81 TFEU, the two legal bases are distinct from each other. Today, the main difference is that Article 81 TFEU requires the existence of a cross-border element, which is not required in the case of Article 114 TFEU, whilst Article 114 TFEU requires that the measure contributes to the functioning of the internal market, which is not required by Article 81 TFEU.

Therefore, as the CJEU ruled in the *Rundfunk* case, Article 114 TFEU may be used to enact legislation applicable both to cross-border and **purely domestic cases**, provided

<sup>54</sup> G. Liebner in: J. Schwarze (ed.), *EU-Kommentar*, 3rd ed., § 37, p. 126.

<sup>55</sup> See e.g. [Case C-300/89 Commission v Council \(Titanium Dioxide\)](#), para. 10; [Case C-269/97 Commission v Council](#), para. 43; [Case C-211/01 Commission v Council](#), para. 38.

<sup>56</sup> [Case C-155/91 Commission v Council](#), paras 19, 21; [Case C-36/98 Spain v Council](#), para. 59; [Case C-211/01 Commission v Council](#), para. 39.

<sup>57</sup> [Case C-336/00 Huber](#), para. 31; [Case C-281/01 Commission v Council](#), para. 35, [Opinion 2/00](#), para. 23; [Case C-211/01 Commission v Council](#), para. 40.

<sup>58</sup> [Case C-211/01 Commission v Council](#), para. 40.

<sup>59</sup> A. Całus, 'Umocowanie...', p. 149-150; B. Ziemblicki, 'Zbliżanie...', 86.

that the national laws need to be harmonised for the smooth functioning of the internal market.<sup>60</sup> In other words, in line with *Rundfunk*, the cross-border element is simply not required in the application of Article 114 TFEU, and the only premise is the functioning of the internal market.

According to Steve Peers, Article 114 TFEU has the character of a *lex generalis*, i.e. a rule which is applicable only insofar as no other more detailed rule (a *lex specialis*) would be applicable.<sup>61</sup> He supports his view with the wording of Article 114 TFEU, which starts with the expression 'Save as otherwise provided in the Treaties...'. In particular, the enactment of procedural rules in areas exempted from Article 114(1) TFEU by its second paragraph, i.e. the free movement of persons, rights and duties of employees, fiscal provisions),<sup>62</sup> would have to be based on Article 81 TFEU, and never on Article 114 TFEU.

Before the Treaty of Lisbon, when the internal market requirement was present in what are now Articles 81 TFEU and 352 TFEU, it could have plausibly been argued that Article 114 TFEU is a *lex generalis*, whilst Articles 81 and 352 TFEU are *leges speciales*.<sup>63</sup> However, following the removal of the obligatory link to harmonisation of the internal market under the latter two Treaty Articles, it seems that the rules in question are now somewhat overlapping.

In particular, it can be pointed out that harmonisation of substantive private law and harmonisation of purely domestic civil procedure are within the scope of Article 114 TFEU (if they are required for the functioning of the internal market), but not within the scope of Article 81 TFEU, which is limited to matters with cross-border implications. Furthermore, the harmonisation of civil procedure which is required for the functioning of the internal market, and which is concerned with cases with cross-border implications, is covered by both Article 114 TFEU and Article 81 TFEU (area of overlap). In line with CJEU case law, if one of the aspects is primary, and the other secondary (ancillary), only one legal basis should be invoked. However, **if both aims are on an equal level, the measure in question should be based jointly on Articles 114 and 81 TFEU.** Until now, no legal act has been based on these two Treaty articles simultaneously.

Finally, measures which are not concerned with the harmonisation of laws, but with the creation of parallel, EU-wide optional regimes, are not covered by Article 114 TFEU (which is explicitly limited to harmonisation), but may fall within the scope of Article 81 TFEU (if it concerns cases with cross-border implications) or – if it is also concerned with cases of a purely domestic character – the legal basis of Article 352 TFEU (the 'flexibility clause') would have to be invoked.

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<sup>60</sup> Cfr. S. Peers, *EU Justice and Home Affairs Law* (3rd ed., Oxford University Press, 2011), p. 611.

<sup>61</sup> *Ibid.*, p. 613.

<sup>62</sup> *Ibid.*

<sup>63</sup> See e.g. K. Weitz in: *TEWG Kommentar*, vol. 2, p. 220-222. However, A. Catus argues that already under the Amsterdam Treaty Article 65 EC was 'to a certain extent a *lex generalis* within the [Area of Freedom Security and Justice.] (Catus, 'Umocowanie...', p. 135).

Comparison of two legal bases for Europeanisation of civil procedure		
	Article 81 TFEU	Article 114 TFEU
<b>Cross-border element</b>	Cross-border 'implications' required	Applicable also to purely domestic matters
<b>Internal market element</b>	Not required	Measure must serve the smooth functioning of the internal market
<b>Area of law affected</b>	Civil procedure, private international law but not substantive private law	Any area of law, public or private
<b>Types of instruments</b>	Directives, regulations, including optional instruments	Mainly directives, regulations; optional instruments – doubtful
<b>Exemptions</b>	Family law subject to special legislative procedure	Free movement of persons, rights and duties of employees, fiscal provisions (subject to Article 115 TFEU – special legislative procedure )

In areas of **overlap of the two legal bases**, i.e. when a measure equally serves the harmonisation of cross-border civil proceedings *and* harmonisation in the internal market, the EU may legislate within the cumulative scope of both Articles. This is because '[w]ithin the scope of overlap, neither [legal basis] excludes the application of the other [legal basis]'.<sup>64</sup>

Therefore, a legislative act on civil procedure which would simultaneously serve both judicial cooperation in civil matters *and* harmonisation in the internal market should be based jointly on Articles 81 and 114 TFEU, and could be applicable both to cross-border cases and to purely domestic ones. This is especially so since the Treaty of Lisbon, as Article 81 TFEU no longer requires the internal market element and therefore cannot be considered as *lex specialis* with regard to Article 114 TFEU.

#### 2.4.3. Legislation affecting (civil) procedure adopted on the basis of Article 114 TFEU

The lack of harmonised rules of civil procedure in the EU can be viewed as an obstacle in its own right to the smooth functioning of the internal market.<sup>65</sup> This explains the presence of a growing body of EU instruments harmonising procedural law on the basis of Article 114 TFEU, which notably includes the Consumer Injunctions Directive, the Consumer Alternative Dispute Resolution (ADR) Directive, the IPR Enforcement Directive and the Antitrust Damages Directive (for an overview see section 4 below). These legal acts harmonise civil procedure both of a cross-border and domestic nature.

#### 2.4.4. CJEU interpretation of substantive private law affecting civil procedure

Another issue, which can be touched upon only briefly here, is the interpretation given by the CJEU to EU acts harmonising substantive private law (in particular consumer contract law), which encroach upon the domain of civil procedure. The CJEU, relying on the doctrine of effectiveness of EU law (*effet utile*), has imposed requirements upon national judges which would not follow from national civil procedure or which may even run counter to national civil procedure.

<sup>64</sup> Ziemblicki, 'Zbliżanie...', p. 76.

<sup>65</sup> See e.g. van Rhee, 'Civil Procedure...', p. 600; Schwartz, 'Enforcement of Private Law...', p. 139, 145; Tulibacka, 'Europeanization...', p. 1564.

The most famous example is the interpretation of Articles 6(1) and 7 of the **Unfair Terms Directive**. For instance, in the *Invitel*<sup>66</sup> case, the CJEU ruled that if a given standard term has been declared unfair, national courts must – of their own motion and also for future cases – take necessary steps to ensure that consumers who have concluded a contract with the trader to which those general business conditions apply will not be bound by that term.

### 3. Optional unification by way of regulations

#### 3.1. Optional instruments in EU private law

An 'optional instrument'<sup>67</sup> is an EU legislative act, usually in the form of a regulation, which creates a **parallel and optional** EU-wide legal regime for a given legal issue. This optional regime does not replace national regimes, but coexists alongside them.

Optional instruments are an attractive alternative to traditional forms of transnational legal cooperation in private law, namely **harmonisation** and (full) **unification**. Harmonisation requires that a majority of Member States agree on a certain level of harmonisation ('minimum' or 'maximum') which can be politically difficult, for example if conflicting interests of various groups (e.g. consumers and businesses) are at stake. Unification requires Member States to give up their existing legal rules and apply a uniform EU regulation instead, which can also be difficult to accept, not only because a common set of rules must be reached, but also because of concerns to preserve national legal culture.

Against this background, optional instruments – sometimes called a form of 'soft harmonisation'<sup>68</sup> – seem to be more attractive because they are less 'intrusive' to national legal systems, and their actual use in practice will depend on private party initiatives (citizens and businesses) in a situation of regulatory competition (EU optional instrument versus national legal regimes). Currently, there are numerous optional instruments in substantive private law, especially in the fields of intellectual property law (e.g. European trademark) and company law (European company, European cooperative, European grouping of interests).

Within the law of civil procedure, there are currently four optional instruments. Three of them create self-contained optional forms of civil procedure (the European Small Claims Procedure (ESCP) – see section 3.2; the European Order for Payment Procedure – Section 3.3 and the European Account Preservation Order – section 3.5). Similar to these is the Online Dispute Resolution (ODR) Regulation (section 3.4), which regulates online ADR proceedings for consumer-trader disputes. These four procedures are complemented with optional EU 'titles', i.e., formal documents recognised across the EU, (briefly presented in section 3.6).

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<sup>66</sup> [Case C-472/10](#).

<sup>67</sup> For a comprehensive overview see B. Fauvarque-Cosson, M. Behar-Touchais, [Implementation of optional instruments within European civil law](#), PE 462.425 (European Parliament, 2012).

<sup>68</sup> Advocate General Maciej Szpunar, [speech delivered at Civil and Commercial Law Panel of the Assises de la Justice conference](#), 22 November 2013, p. 2.

### 3.2. European Small Claims Procedure (ESCP)

The ESCP was established by a Regulation in application since 1 January 2009.<sup>69</sup> It is available for cross-border private law claims of a value not exceeding €2 000, with the exclusion of some types of claims (e.g. regarding capacity of natural persons, successions, family, insolvency and labour law, violations of privacy). The ESCP is a simplified procedure: it is predominantly written, standard forms are generally used, and representation by a lawyer is not obligatory. Judgments are directly enforceable, notwithstanding an appeal, in all Member States without the need for *exequatur*. Even now, under Brussels Ia, the position of the creditor under the ESCP in comparison to the 'reverse *exequatur*' of Brussels Ia is stronger, because the grounds for opposing enforcement are narrower within the ESCP.

The ESCP Regulation, although it creates a genuinely EU-wide type of civil procedure, still relies on background national rules, such as those regarding the competence and organisation of courts, the possibility and methods of appeal, detailed rules on delivery of documents and the taking of evidence, as well as court fees.

Despite being a potentially useful tool for creditors, according to available statistical data, in practice the ESCP is not frequently used.<sup>70</sup> Taking stock in a review of its functioning during its first five years of existence,<sup>71</sup> the Commission came up with an **amendment proposal in 2013**.<sup>72</sup> It aims to: raise the ceiling for 'small' claims from €2 000 to €10 000; make the procedure available in a broader range of cases by considerably diluting the 'cross-border' requirement; introduce a maximum cap on court fees to make the procedure cheaper for claimants; and introduce obligatory use of distant communication whenever parties are domiciled in different Member States. On 16 April 2015, the Parliament's Legal Affairs Committee (JURI) adopted its report on the proposal,<sup>73</sup> and the rapporteur (Lidia Geringer de Oedenberg, S&D, Poland), received a mandate to start negotiations with the Council with a view to seeking agreement at first reading.<sup>74</sup>

<sup>69</sup> For an overview of the current legal framework of the ESCP see R. Mańko, [European Small Claims Procedure: Legal analysis of the Commission's proposal to remedy weaknesses in the current system](#), PE 542.137 (EPRS, 2014), pp. 7-18. See also E. Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered* (OUP, 2008), ch. 13; J.P. Cortès Dieguez, '[Does the proposed European procedure enhance the resolution of small claims?](#)', *Civil Justice Quarterly* 27.1 (2008): 83-97; X.E. Kramer, 'The European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Litigation', *Zeitschrift f. eur. Privatrecht* 2 (2008): 355-373.

<sup>70</sup> For an overview of the statistics see: R. Mańko, [European Small Claims...](#), pp 18-20, 30. See also X.E. Kramer, E.A. Ontanu, 'The functioning of the European Small Claims Procedure in the Netherlands: normative and empirical reflections', *Nederlands Internationaal Privaatrecht* 3 (2013): 319-328.

<sup>71</sup> Deloitte, [Assessment of the Socio-Economic Impacts of the policy options for the future of the European Small Claims Regulation](#) (European Commission, 2013).

<sup>72</sup> COM(2013) 794 final, inter-institutional file [2013/0403\(COD\)](#). For a legal analysis of the proposal, see R. Mańko, [European Small Claims Procedure...](#), pp. 21-26. Cf. A. Maniaki-Griva, '[Initial Appraisal of a European Commission Impact Assessment: European Small Claims Procedure](#)', PE 514.109 (EPRS, 2014). See also P. Cortès, 'The European Small Claims Procedure and the Commission proposal of 19 November 2013' in U. Bux (ed.), [Cross-border activities in the EU: Making life easier for citizens](#), PE 510.003 (European Parliament, 2014): 249-269.

<sup>73</sup> [PE 539.630](#).

<sup>74</sup> For a more detailed overview of the on-going legislative procedure see R. Mańko, '[Legislation in Progress: Reform of the European Small Claims Procedure](#)', PE 557.014 (EPRS, 2015).

### 3.3. European Order for Payment (EOP)

The optional European Order for Payment was created in 2006, and has been available since 2008 in all Member States except Denmark.<sup>75</sup> With regard to certain aspects, such as the competent court, court fees or details of service (delivery) of documents, the Regulation refers, similarly to the ESCP Regulation, to background rules of national law. Otherwise, however, it is a self-contained and autonomous EU civil procedure.

The main aim of the EOP procedure is to **simplify, accelerate and reduce the costs of cross-border civil litigation concerning uncontested claims for money**. In contrast to the ESCP, there are no minimum or maximum thresholds as to the value of the claim, making it also useful for claims under business-to-business contracts.<sup>76</sup> Claims for money arising from marriage or succession, as well as all public law claims are excluded. Claims arising from non-contractual obligations are allowed only if the parties have agreed to their amount, or if the debtor admitted the debt. The court in which an EOP application has been launched examines it from the point of view of formal requirements, and does not analyse any evidence. If all the formal requirements are met, and the claim appears to be founded, the court issues an EOP.

The EOP procedure is not adversarial and the defendant becomes aware of an EOP only when it is served.<sup>77</sup> This makes the rules on service essential from the point of view of **safeguarding** defendants' interests. Service is governed by the law of the Member States in which it is to take place, subject to minimum standards set out in the Regulation.

The intent of the Regulation is to speed up cross-border civil proceedings, but only as long as the claim remains uncontested.<sup>78</sup> Hence, once a defendant files a statement of opposition, the EOP automatically loses its force and the case is transferred to standard civil proceedings. An EOP is automatically recognised and enforceable in all the Member States, without the need for *exequatur*.

### 3.4. Online Dispute Resolution (ODR) Regulation

Based on Article 114 TFEU, the ODR Regulation<sup>79</sup> of 2013, provides for the creation of an 'ODR platform' for consumers and businesses wishing to solve their disputes via online ADR. The Regulation applies to disputes arising from online contracts for the sale of goods or provision of services, concluded between a consumer resident in the EU and a business likewise established in the Union. In principle, the Regulation applies to consumer-business disputes, but Member States have the option of also including business-consumer ADR in its scope. The Regulation can be described as an **optional instrument**, as it does not replace any national ADR systems, and its use is not obligatory.

<sup>75</sup> On the EOP see e.g. Storskrubb, *Civil Procedure...*, ch. 12; C. Crifò, *Cross-border enforcement of debts in the European Union: default judgments, summary judgments and orders for payment* (Kluwer, 2009); X.E. Kramer, 'Enhancing Enforcement in the European Union. The European Order for Payment Procedure and Its Implementation in the Member States, Particularly in Germany, the Netherlands and England', in C.H. van Rhee, A. Uzelac (eds), *Enforcement and Enforceability: Tradition and Reform* (Intersentia, 2010). For a very brief overview of the procedure see R. Mańko, '[Orders for payment in the EU: National procedures and the European Order for Payment](#)', *EP Library Briefing* (2013).

<sup>76</sup> L. Demeyer, 'Commercial Litigating in the European Union: A Changing Landscape', *International Business Law Journal* 4 (2008): 481-508, p. 500.

<sup>77</sup> [Case C-144/12](#), *Sperindeo* para. 29.

<sup>78</sup> *Ibid.*, para 42.

<sup>79</sup> [Regulation \(EU\) No 524/2013](#) of 21 May 2013 on online dispute resolution for consumer disputes.

Under the Regulation, the Commission will develop and operate an ODR platform, a single point of entry for consumers and traders seeking an out-of-court resolution of their dispute. The website will be free of charge and available in all official EU languages. Member States, on their side, will authorise ADR entities to participate in the ODR scheme. The Regulation prescribes, in detail, the functioning of the ODR platform, e.g. the submission, processing, transmission of complaints and the resolution of disputes. However, it does not prescribe the dispute resolution procedure itself, such as online negotiations and case management.<sup>80</sup> Detailed standard rules for ODR, including for low-value business-to-consumer disputes, are currently being developed by the United Nations Commission for International Trade Law (UNCITRAL).<sup>81</sup>

### 3.5. European Account Preservation Order (EAPO) procedure

The EAPO procedure has been established by a 2014 Regulation<sup>82</sup> and will apply as from 18 January 2017. This procedure, just like ESCP and EOP, will be optional, available to creditors as an alternative to domestic account preservation measures. As in the case of other optional instruments, all procedural issues not addressed in the Regulation will be governed by the law of the Member State in which the procedure takes place (*lex fori*). Its scope will extend to civil pecuniary claims in cross-border cases, but with the exclusion of matrimonial and quasi-matrimonial property rights, claims under succession law, and claims under insolvency law. Likewise, public law claims, social security claims and arbitration claims will be excluded.

Creditors will be able to submit an application for an EAPO if they demonstrate an urgent need for a protective measure due to a real risk that, without such a measure, the enforcement of their claim will be impeded or made substantially more difficult. An application will be admissible even before a judgment is obtained against the debtor, provided that the creditor can prove the likelihood of such a judgment.

The Regulation sets out the course of the EAPO proceedings in detail, including the application, taking of evidence (with a preference for written proceedings), and proceedings on the substance. The EAPO proceedings are to be held *ex parte*, which means that the debtor will not be heard prior to the issue of the order. The order will be enforceable in the same way as national bank account preservation orders. The debtor may appeal against the EAPO to the competent court of the Member State of origin. A limited possibility of appeal against enforcement of the EAPO will be available before the competent enforcement authority of the Member State of enforcement.

### 3.6. Other optional instruments

Apart from entirely optional procedures (the ESCP, EOP and EAPO), and the optional digital ADR procedure provided for by the ODR regulation, the EU has also created two other optional mechanisms in the field of civil procedure – the **European Enforcement**

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<sup>80</sup> P. Cortés, '[A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward](#)', *Legal Studies* 35.1 (2015): 114-141.

<sup>81</sup> For details see P. Cortés, F.E. de la Rosa, '[Building a Global Redress System for Low-Value Cross-Border Disputes](#)', *International and Comparative Law Quarterly* 62.2 (2013): 407-440.

<sup>82</sup> [Regulation \(EU\) No 655/2014](#) of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

**Order (EEO)**<sup>83</sup> and the **European Certificate of Succession (ECS)**.<sup>84</sup> In contrast to the optional procedures, these two instruments are not fully fledged EU-wide forms of civil litigation, but only a form of certification of national judgments to enable their automatic recognition and enforcement across the EU. Indeed, the aim of introducing the EEO was to permit, by laying down minimum standards, the free circulation of judgments, court settlements and authentic instruments throughout all Member States without the need for *exequatur*. The minimum standards to which the EEO refers are not concerned with the fairness of proceedings, but only with the service of court documents on the defendant, as the EEO is meant for 'uncontested claims' only, and not for judgments issued as a result of adversarial litigation.

## 4. Sector-specific harmonisation by way of directives

### 4.1. 'Proceduralisation of EU law through the back door'

Increasingly, the EU legislature addresses issues of civil procedure not only horizontally, as with optional instruments, but also in a sector-specific manner, within other policy fields, such as intellectual property, consumer protection or, recently, competition law. The emergence of such **sector-specific EU law of civil procedure** creates challenges for coherence both at the level of the Member States (coherence of and with domestic civil procedure systems) and the EU level (coherence between various sector-specific instruments). At some point, a need may emerge to coordinate the existing sectoral legislation in the form of horizontal harmonisation measures (see section 6).

This section provides an overview of the existing sectoral legislation on EU civil procedure, sometimes described as 'proceduralisation of EU law **through the back door**'.<sup>85</sup> Characteristically, all the sectoral instruments on procedural law have been adopted on the internal market legal basis (now Article 114 TFEU), and therefore they are concerned with both cross-border and purely domestic cases.

### 4.2. Consumer Injunctions Directive

EU law protects not only the interests of individual consumers, but also the collective interest of consumers as a group. The procedural aspects of this protection are set out in the Consumer Injunctions Directive,<sup>86</sup> which replaced an earlier text from 1998. The Directive regards the group interests of consumers existing both under typical consumer protection instruments, including the Directives on consumer rights, consumer credit, marketing of financial services, package travel, unfair terms, consumer sales, unfair commercial practices, and timesharing, as well as consumer rights incidentally regulated in other instruments, including the Directives on TV broadcasting (89/552), copyright (2001/31) and medicines (2001/83).

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<sup>83</sup> [Regulation \(EC\) No 805/2004](#) of 21 April 2004 creating a European Enforcement Order for uncontested claims.

<sup>84</sup> [Regulation \(EU\) No 650/2012](#) of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

<sup>85</sup> This was the title of a [conference](#) organised by the University of Maastricht – Faculty in Brussels on 20-21 October 2014.

<sup>86</sup> [Directive 2009/22/EC](#) of 23 April 2009 on injunctions for the protection of consumers' interests.

The Directive obliges Member States to introduce into their procedural law an **'action for injunction'**, which may be brought either by independent public bodies responsible for protecting consumers, or by consumer-protection organisations. The aim of such an action is to order the trader to stop infringing collective consumer interests. An action for injunction may be heard either by a court, or by an administrative authority, or a mixed system may be envisaged. For instance in Poland, decisions regarding injunctions are taken by the Consumer and Competition Protection Authority, but appeal may be made to a court according to civil procedure rules.

### 4.3. Consumer alternative dispute resolution (ADR) Directive

The Consumer ADR Directive<sup>87</sup> of 2013, based on Article 114 TFEU, has to be transposed by Member States by 5 July 2015. It seeks to harmonise consumer ADR across the EU, by guaranteeing that all disputes that arise from the online or offline sale of goods or provision of services between consumers and traders within the EU can be submitted to an ADR entity. It harmonises quality requirements for ADR entities and ADR procedures, with the aim of ensuring that consumers across the EU have access to high-quality, transparent, effective and fair out-of-court redress mechanisms no matter where they reside in the Union. It is a **minimum harmonisation** directive, and Member States are free to impose more stringent requirements upon ADR entities.

### 4.4. IPR Enforcement Directive

The IPR Enforcement Directive<sup>88</sup> harmonises national measures, procedures and remedies serving the enforcement of intellectual property rights, including industrial property. Some rules of the Directive are concerned with substantive law, e.g. the right to damages, but most are of a procedural nature. For instance, the Directive requires Member States to introduce injunctions prohibiting the infringement of IPRs, including interlocutory injunctions, rules on recovery of legal costs by the IPR holders, publication of judicial decisions, as well as a number of rules on evidence.

### 4.5. Antitrust Damages Directive

The recently adopted Antitrust Damages Directive<sup>89</sup> regulates the civil law enforcement of claims arising under EU and domestic **competition rules**. It was adopted on the joint legal bases of Articles 101 and 114 TFEU; the deadline for implementation expires on 27 December 2016. It contains both rules of substantive private law regarding delictual liability for violations of competition law (Article 3), as well as purely procedural rules regarding evidence (Article 5-7), and consensual resolution of disputes (Article 18-19), which affect national civil procedural law.

## 5. Horizontal harmonisation of selected areas of civil procedure

### 5.1. Addressing selected aspects horizontally

In contrast to the sector-specific approach (section 4 above), which aims to harmonise civil procedure in the context of other EU policies, such as the protection of consumers, the protection of IP rights or competition law, a number of directives also harmonise

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<sup>87</sup> [Directive 2013/11/EU](#) of 21 May 2013 on alternative dispute resolution for consumer disputes.

<sup>88</sup> [Directive 2004/48/EC](#) of 29 April 2004 on the enforcement of intellectual property rights.

<sup>89</sup> [Directive 2014/104/EU](#) of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU.

civil law horizontally, yet through a piecemeal approach. They are applicable, in principle, to all types of civil cases (regardless of the area of law in which they emerge), however, they do not address the principles of civil procedure in general, but only selected aspects. Apart from directives, for purposes of piecemeal horizontal harmonisation, the Commission has also resorted to a recommendation in the sensitive area of collective redress (group litigation, class actions).

## 5.2. Legal Aid Directive

The first horizontally applicable directive, harmonising a specific aspect of civil procedure, was the Legal Aid Directive,<sup>90</sup> enacted in 2003 and transposed by 2006. It was enacted on the legal basis of what are now Articles 61 and 87 TFEU. It applies only to cross-border disputes and does not apply to Denmark. The notion of a 'cross-border' dispute is defined by reference to the place of domicile or habitual residence of the person applying for legal aid, and the place where the court is sitting or where the decision is to be enforced.

The Directive creates a **right to legal aid for natural persons** involved in a cross-border dispute if they are partly or totally unable to meet the costs of proceedings as a result of their economic situation, in order to ensure their effective access to justice. A competent authority is to assess the need for legal aid on the basis of objective factors, including income, capital or family situation. Member States may define ceilings above which parties are deemed not to need legal aid. Legal aid is defined as covering both pre-litigation advice, with a view to reaching a settlement prior to bringing legal proceedings, legal assistance and representation in court, as well as exemption from costs or assistance with covering the costs of litigation.

## 5.3. Mediation Directive

The second horizontally applicable directive, harmonising a selected aspect of civil procedure, is the Mediation Directive,<sup>91</sup> enacted in 2008 and transposed by 2011.<sup>92</sup> It applies to cross-border disputes in civil and commercial matters. The delictual liability of states, as well as any public law claims, such as those arising under revenue, customs or administrative matters, are excluded. The Directive does not apply to Denmark. It was enacted on the legal basis of what are now Articles 61 and 87 TFEU.

The Directive obliges Member States to encourage the development of voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality-control mechanisms. It does not create a duty for courts to invite parties to mediation, but states that a court may, if it deems it appropriate under the circumstances, invite parties to use mediation or invite them to an information session on mediation. Member States are free to introduce obligatory mediation, as well as to introduce incentives or sanctions promoting mediation, but they must not bar litigants from access to the judicial system if they wish to do so.

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<sup>90</sup> [Council Directive 2002/8/EC](#) of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

<sup>91</sup> [Directive 2008/52/EC](#) of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

<sup>92</sup> For an analysis of the functioning of the directive in practice, see: G. De Palo, 'Mediation as Alternative Dispute Resolution (the functioning of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters)' in U. Bux (ed.), [Cross-border activities...](#)

## 5.4. Collective Redress Recommendation

Following a green paper and public consultations, in 2013 the Commission adopted its Collective Redress Recommendation,<sup>93</sup> setting **26 July 2015** as the deadline for implementation. Unlike a directive, however, a recommendation adopted on the basis of Article 292 TFEU is a **non-binding** instrument, and the Member States do not have a legal duty to implement it.

The Recommendation addresses situations of **'mass harm' caused by violations of rights granted by EU law**. It is therefore a horizontal instrument,<sup>94</sup> in that it does not limit itself to a specific sector, such as consumer law or competition law. The Commission recommends that all Member States have collective redress mechanisms at national level, both for injunctions and for compensation of damages. The document adopts the model of a 'representative action', whereby a special entity or a public authority brings the collective action on behalf of all injured parties. The special entity should be non-profit making, and its main objectives should be linked to the rights which under EU law have been violated. Such entities may be designated either in advance, or on an ad hoc basis. The Recommendation provides rules on the representative's financial transparency. It is, in principle, against contingency fees, providing that lawyers' fees and the method of their calculation should not incentivise litigation which is 'unnecessary from the point of view of the interest of any of the parties'. Damages should not exceed the level of compensation that would have been granted in individual lawsuits.

## 6. Towards across-the-board horizontal harmonisation of minimum standards of civil procedure in the EU?

### 6.1. Background

The progressive involvement of the EU within substantive private law has led a number of academics to propose a 'European Civil Code' which, for now, has taken the form of a 'Draft Common Frame of Reference' – a set of principles and rules intended as a harmonising toolbox for the EU and national legislatures. Also, the idea of a European Code of Private International Law (bringing together the EU rules regarding conflicts of laws) is gaining momentum.<sup>95</sup> Owing to the growing volume of EU *acquis* in the field of civil procedure (see sections 3-5), and with a view to the necessity of providing an EU-wide balance of fundamental rights of litigants, in the interests of promoting mutual trust in judiciaries of fellow Member States, the question of a 'common frame of reference' or even 'code' of European civil procedure has become relevant. The

<sup>93</sup> [Commission Recommendation of 11 June 2013](#) on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU). From the literature see e.g. S. Voet, '[European Collective Redress: A Status Quaestionis](#)', *International Journal of Procedural Law* 4.1 (2014): 97-128; idem, '[The Crux of the Matter: Funding and Financing Collective Redress Mechanisms](#)', in *EU Civil Justice: Current Issues and Future Outlook* (Hart Publishing, forthcoming).

<sup>94</sup> Voet, '[European collective redress...](#)', p. 107.

<sup>95</sup> X.E. Kramer, '[Current gaps and future perspectives in European private international law: towards a code on private international law?](#)', PE 462.476 (European Parliament, 2012); X.E. Kramer, 'European Private International Law: The Way Forward' in U. Bux, R. Panizza, R. Raffaelli (eds), '[Upcoming issues of EU law](#)', PE 509.987 (European Parliament, 2014).

question was explicitly raised by the European Commission in its discussion paper for the *Assises de la Justice* conference in November 2013, where the Commission pointed towards the need for 'full mutual trust' between EU judiciaries, and did not exclude that the process 'may call for a codification of [civil procedure] rules in the interests of legal certainty'.<sup>96</sup>

The history of the European Code of Civil Procedure project dates back at least to 1990, when the Commission asked a group of experts, under the leadership of Professor Matthias Storme, to prepare a study on the possibility of approximating the national laws of civil procedure.<sup>97</sup> It was the first attempt to look for common elements between continental and Anglo-Saxon civil procedures.<sup>98</sup> The report of the Storme Group was published in 1994,<sup>99</sup> giving rise to a broader debate on the harmonisation of civil procedure in Europe.

## 6.2. The American Law Institute (ALI) and Unidroit project

In an attempt to 'combine common law and civil law approaches to civil litigation',<sup>100</sup> a joint team of the **American Law Institute (ALI)** and the **International Institute for the Unification of Private Law (Unidroit)** drafted two documents distilling what they perceived as 'best practices' in international commercial litigation. On a higher level of abstraction were the '**Principles of Transnational Civil Procedure**' (PTCP),<sup>101</sup> finalised in 2004. The PTCP consist of 31 principles which address, inter alia, such issues as the independence and impartiality of the court (principle 1), jurisdiction (principle 2), procedural equality (principle 3), right to engage a lawyer (principle 4), right to be heard (principle 5), language regime (principle 6), speed of proceedings (principle 7), and a number of more detailed principles on the course of proceedings (principles 8-23). The PTCP is accompanied by an official commentary. According to Andrews, the PTCP 'offer a balanced distillation of best practice', and one of their advantages is that they 'are not restricted to the largely uncontroversial "high terrain" of constitutional guarantees', but offer a text somewhere in between the most general principles and the detailed rules found in codes of civil procedure.<sup>102</sup>

On the basis of the broadly framed PTCP, its reporters prepared more detailed '**Rules of Transnational Civil Procedure**' (RTCP),<sup>103</sup> which have not, however, been formally adopted either by Unidroit, or the ALI.<sup>104</sup> The RTCP consist of 39 Rules which are more detailed than the PTCP and are framed in a way which allows for their direct judicial application. They can also serve as a source of direct legislative inspiration for national law-makers.<sup>105</sup>

<sup>96</sup> European Commission, [Assises de la Justice. Discussion Paper 1: EU Civil Law](#), p. 2-3.

<sup>97</sup> E. Storskrubb, *Civil Procedure and EU Law...*, p. 21.

<sup>98</sup> N. Andrews, 'Fundamental Principles of Civil Procedure: Order Out of Chaos', in X.E. Kramer, C.H. van Rhee (eds.), *Civil Litigation in a Globalising World* (T.M.C. Asser Press, 2012), p. 23.

<sup>99</sup> M. Storme (ed.), *Approximation of Judiciary Law in the European Union* (Martinus Nijhoff, 1994).

<sup>100</sup> Andrews, 'Fundamental Principles...', p. 21.

<sup>101</sup> '[ALI / Unidroit Principles of Transnational Civil Procedure](#)', *Uniform Law Review* 4 (2004): 758-808.

<sup>102</sup> Andrews, 'Fundamental Principles...', p. 21.

<sup>103</sup> A. Gidi, G. Hazard, M. Taruffo, R. Stürner, '[Rules of Transnational Civil Procedure](#)', *New York University Journal of International Law and Politics* 33.3 (2001): 793-859.

<sup>104</sup> M. Weller, '[The ELI-UNIDROIT Project: From Transnational Principles to European Rules of Civil Procedure – 1st Exploratory Workshop](#)', *Conflict of Laws*, 22 October 2013.

<sup>105</sup> Andrews, 'Fundamental principles...', p. 21.

### 6.3. The European Law Institute (ELI) and Unidroit project

In October 2013 the European Law Institute (ELI) and the International Institute for the Unification of Private Law (Unidroit) held a workshop on the possibility of drafting 'European Rules of Civil Procedure'.<sup>106</sup> The underlying idea was to establish whether the ALI/Unidroit 'Principles' could be adapted to the EU context.

In May 2014, the ELI/Unidroit joint project on the preparation of Transnational Principles of Civil Procedure for Europe was launched at the Unidroit seat in Rome.<sup>107</sup> The Steering Committee decided that the first issues to be addressed will be evidence, interim measures and the service of documents. In a further step, the group would work on *res judicata* and case management (i.e. the respective role of parties, lawyers and the court during proceedings). Enforcement and structure of proceedings would be dealt with at a later stage, whereas costs and collective actions would not be addressed. A starting point for the European Principles would be the ALI/Unidroit Principles of Transnational Civil Procedure. Other sources of inspiration would include the French Code of civil procedure and other codes, CJEU and ECtHR case law as well as the *acquis* in the field of civil procedure.

In November 2014, the preliminary reports of the working groups on evidence, interim measures and service documents were presented and further working groups (for *lis pendens* and *res judicata*, and for case management) were established.<sup>108</sup> The meeting was attended by observers from various institutions, including the EP's Legal Affairs Committee, the CJEU and the Commission.

On 16 April 2015, a meeting of the ELI/Unidroit project group was held in Brussels, during which progress reports of the working groups on 'access to information and evidence', 'service of documents', as well as 'provisional and protective measures' were discussed, as well as the first reports of the working groups on '*res judicata* at *lis pendens*' and 'obligations of the parties and lawyers'. Following the meeting, the ELI/Unidroit project was presented at a **hearing of the EP Legal Affairs Committee**.<sup>109</sup>

### 6.4. Towards harmonising the principles of European civil procedure?

Once adopted as a soft-law instrument, the 'European Rules of Civil Procedure' could form the basis for the development of a horizontal EU directive,<sup>110</sup> codifying the fundamental principles of civil procedure which, within the realm of the ECHR and the EU Charter, can be considered as striking a fair balance between the rights and interests of both claimants and defendants. The main issue would be to detect the appropriate level of detail. As A. Zuckermann argues, the mutual recognition of judgments could best be served by establishing common **general standards**, but

<sup>106</sup> Weller, '[The ELI-UNIDROIT...](#)'; '[ELI-UNIDROIT Project: From Transnational Principles to European Rules of Civil Procedure](#)', 1st Exploratory Workshop Vienna, 18 and 19 October 2013.

<sup>107</sup> '[Transnational Civil Procedure – Formulation of Regional Rules: ELI – UNIDROIT Rules of Transnational Civil Procedure](#)', Steering Committee, Study LXXVIA, Unidroit 2014, Rome, 12-13 May 2014.

<sup>108</sup> '[Transnational Civil Procedure – Formulation of Regional Rules: ELI – UNIDROIT Rules of Transnational Civil Procedure](#)', Rome, 27-28 November 2014, Draft Agenda.

<sup>109</sup> '[ELI-UNIDROIT Joint Meeting and JURI Committee Presentation](#)', ELI website; '[JURI hearing web-streaming](#)', 16.4.2015, item 13.0.

<sup>110</sup> Another approach, which will not be discussed in detail here, would be to develop a 'European Code of Civil Procedure' in the form of an optional set of procedural rules, which parties could opt into. See A. Schwartze, 'Enforcement of Private Law...', p. 144-146.

without harmonising at the level of specific rules.<sup>111</sup> The existing output of the ALI/Unidroit project seems to address the regulation of civil procedure at this very level of intermediate detail, between the broadest constitutional principles (such as those found in the EU Charter or the ECHR) and the technicalities found in national laws.

An additional argument in the form of a directive of principles, rather than of rules can be transposed *per analogiam* from the field of substantive private law, where it was made by H. Collins.<sup>112</sup> A set of binding, medium-level detailed EU principles of civil procedure in the form of a directive could strike the balance between, on the one hand, the need for flexibility and taking into account the divergence of national civil procedures, and, on the other hand, the growing need for increasing mutual trust in judiciaries of fellow Member States, on the basis of a commonly acceptable balance of fundamental rights of litigants.

## 7. Conclusions

The free circulation of judgments, especially after the abolition of *exequatur* and its replacement with the so-called 'reverse *exequatur*', increasingly opens up national legal spaces in the Member States to judicial decisions issued in their fellow Member States. Whilst under the old *exequatur* regime, a foreign judgment would be recognised and enforced only after national sovereignty granted it a stamp of approval, foreign judgments are now, in principle, automatically recognised and enforceable. The debtor may, however, within enforcement proceedings, raise objections to the foreign judgment, including the exception of public order (*ordre public*) to block its enforcement (the 'reverse *exequatur*' procedure). Nevertheless, the new system gives the upper hand to creditors, and strengthens the principle of free circulation of national judgments within the European Area of Justice.

This free circulation presupposes a **high level of mutual trust** between the national judiciaries. If judgments from Member State A are, in principle, enforceable, without any additional procedure, in Member State B, this will be acceptable to the legal community of Member State B only if that community has sufficient trust in the quality of the judiciary of Member State A. Mutual trust is a complex notion and many factors play a role in building this trust. They include a number of 'soft' factors, such as judicial education, cross-border judicial cooperation (e.g. in the European Judicial Network), exchange of experience between judges etc. However, from a strictly legal point of view, mutual trust presupposes, at a very fundamental level, that national judiciaries in the Union perceive each other's procedural arrangements (on both the level of law-on-the-books and of law-in-action) as guaranteeing **fair civil proceedings**.

The understanding of the notion of 'fairness' of civil proceedings is, in modern law, viewed inter alia through the optic of **fundamental rights**. The claimant enjoys a right to access to justice to pursue their claim, and the defendant has the right to defend themselves. The principles and rules of civil procedure, from the most abstract and general, right down to the technical and detailed, can be viewed as an expression of the balance between the fundamental rights of litigants. They also provide for the role of the court in civil proceedings, which can vary from passive umpire to active case

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<sup>111</sup> Cited after: Andrews, 'Fundamental Principles...', p. 25.

<sup>112</sup> H. Collins, 'Why Europe Needs a Civil Code', *European Review of Private Law* 4 (2013): 907-922. Cf. Maňko, *EU competence...*, p. 19.

manager. What balances are struck between the rights of claimants and defendants, and what exact role is accorded to the judge, differs greatly between Member States and often depends on national legal cultures. The exact set-up of a given national civil procedure expresses different underlying legal traditions, political views and societal values.

Is it possible, despite these inherent differences, to look for a common denominator, which would guarantee the necessary degree of mutual trust between national judiciaries in the EU? The case law of the CJEU and the Strasbourg Court, interpreting respectively **Article 47 of the EU Charter** and **Article 6 ECHR** in the context of civil proceedings, bears witness to the difficulties and controversies, but also indicates the possibility of finding such common ground. However, the judicial development of common minimum standards of civil procedure occurs on a **case-by-case basis** and does not give parties full legal certainty.

Legislative intervention harmonising civil procedure at EU level could be, in parallel, another way forward in building mutual trust. First of all, EU civil procedure has been unified by way of regulations instituting 'autonomous', EU-wide procedures. These regulations are 'optional' instruments, in that claimants may use the procedures prescribed therein, but may still prefer to use domestic procedures. They strike their own balance of claimants' and defendants' fundamental rights, and prescribe the role of the court. In that, they create a common EU standard, which, presumably, should increase mutual trust in judgments rendered under these procedures. Indeed, before *exequatur* was abolished under Brussels Ia, it was abolished in the 'second-generation' instruments establishing the optional procedures.

Another way forward to increase mutual trust is by harmonising national civil procedures. In contrast to optional instruments which create EU-wide forms of civil procedure in parallel to national law, harmonising instruments affect domestic civil procedure and oblige Member States to approximate their national rules of civil procedure to conform to the EU model. This process of harmonisation takes place following a dual path. On the one hand, the EU legislature adopts **sector-specific instruments**, based on Article 114 TFEU, which address civil-procedural aspects of certain types of claims under EU law. On the other hand, the EU legislature also adopts **horizontal instruments**, harmonising national civil-procedural laws regardless of subject-matter. These instruments, based on Article 81 TFEU, have been limited to cross-border proceedings only. A non-binding recommendation, whose scope also includes purely domestic cases, addresses collective redress in cases concerning rights granted under EU law.

The emergence of a sector-specific EU civil procedural law, enacted under Article 114 TFEU, and the gradual emergence of horizontal EU civil procedural law under Article 81, applicable only to cross-border cases, inevitably leads to tension, and challenges the coherence of civil procedure in Europe, not only between the 'islands' of harmonised/unified EU law and national law, but also with EU law itself.<sup>113</sup>

Some suggest that the way forward is the elaboration of codified, minimum standards of EU civil procedure in the form of an **across-the-board horizontal directive** which would lead to increasing mutual trust among EU judiciaries and ensure a common, EU-wide balancing of fundamental procedural rights for civil cases. A preliminary stage

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<sup>113</sup> Cf. Tulibacka, 'Europeanization of civil procedures...', p. 1548, 1555-1557.

leading towards its possible adoption in the future has already been embarked upon by the **European Law Institute** which, together with **Unidroit**, has begun drafting the principles of European civil procedure. In the future, such principles may be used as a basis for an EU directive. A number of challenges will need to be addressed. First of all, a compromise between divergent national civil procedures will need to be found, allowing enough space for divergent legal cultures and traditions. However, the historical evidence of cross-fertilisation of national civil procedures,<sup>114</sup> and the recent example of the ALI/Unidroit project allow for optimism. Secondly, the draft will also have to strike a **balance between generality and specificity** of its provisions, so as to avoid creating a text which, although general and abstract enough to be acceptable for all Member States, is not specific enough to actually promote common standards that allow for an increase of mutual trust. Finally, an important issue will be that of **coherence**, 'the precondition to ... an effective law enforcement system',<sup>115</sup> both within the harmonising measure, as well as between it and existing EU law in the field.

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<sup>114</sup> See e.g. Van Rhee, 'Civil Procedure...', p. 593ff.

<sup>115</sup> Tulibacka, 'Europeanization...', p. 1565.

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The free movement of judgments in the European Area of Justice presupposes a high level of mutual trust between the judiciaries of the Member States. From the citizens' perspective, the key issue is the balancing of the fundamental rights of claimants and defendants, i.e. the right of access to justice (to pursue a claim) and the rights of the defence.

Mutual trust in judiciaries can be built in various ways. First of all, through the creation of uniform European procedures in the form of optional instruments, which lead to the pronouncement of judgments on the basis of common rules of procedure. Secondly, sector-specific harmonisation of procedural law is possible, addressing civil procedure in the context of other policy areas, such as intellectual property, competition law or consumer protection. Thirdly, horizontal harmonisation of civil procedure by way of directives is also possible. Up to now, only selected and rather narrow areas of civil procedure have been addressed in this manner.

However, a more ambitious project has been launched by the European Law Institute (ELI) in collaboration with the International Institute for the Unification of Private Law (Unidroit), aimed at elaborating European rules of civil procedure. These rules, once finalised, could be the basis of a future directive on minimum standards of civil procedure in the EU.

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